In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,
Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO,
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is neither officially nor unofficially reported and is attached to the Petition as Appendix A, pp. 1-11 (hereinafter "Appendix A"). The opinion of the Court of Appeals is attached

to the Petition as Appendix B, pp. 12-22 (hereinafter "Appendix B"), and is also reported at 529 F.2d 1073.

JURISDICTION

The jurisdictional requisite is adequately set forth in the Petition on page 2.

QUESTIONS PRESENTED

The Petition seeks review of a judgment, by the United States Court of Appeals for the Ninth Circuit, which affirmed the issuance of a preliminary injunction. Prior to the filing of the Petition, the injunction terminated. The threshold question presented is:

> When a Petition seeks review of an injunction which has already terminated prior to the filing of the Petition, should this Court refuse to issue a Writ of Certiorari because no actual case or controversy exists and the matter is moot?

The injunction was sought by a labor union to prevent the irreparable harm that would occur if an employer unilaterally changed certain working conditions which had been in effect for fifteen (15) years pursuant to an agreement between the parties. The union had requested the employer to submit the dispute to expedited arbitration and to preserve the status quo pending the arbitrator's decision. When the employer

refused those requests, the union filed an action, pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. section 185. After a hearing at which both parties presented witnesses and evidence, the District Court, pursuant to *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970), issued a preliminary injunction to preserve the status quo pending arbitration. A panel of the Ninth Circuit unanimously affirmed. The other questions raised by the Petition are:

1. Was the issuance of a preliminary injunction by the District Court proper because it promoted the strong Congressional policy in favor of arbitrating labor-management disputes?

2. In ruling on the application for injunctive relief, the District Court refused to speculate as to which party was more likely to prevail on the merits *at arbitration.* The Court held that such speculation would constitute an improper judicial intrusion into the domain of the arbitrator. Was the District Court correct in its refusal to rule on the merits of an arbitrable dispute?

3. The District Court refused to require payment on the injunction bond if the employer won on the merits before the arbitrator. Instead, the Court conditioned payment, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, on a subsequent showing that the employer had been "wrongfully restrained." Was it proper for the Court to condition the bond in the manner specified by the rule?

STATUTES INVOLVED

The pertinent statutes are set forth in the Petition on page 4.

STATEMENT OF THE CASE

I. The Parties.

The Petitioner in this case is Greyhound Lines, Inc. ("Greyhound" or the "Company"). It is a national corporation and an employer in an industry affecting commerce within the meaning of sections 2(2) and 2(7) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. sections 152(2), (7).

The Respondents are Amalgamated Transit Union, Division 1384, AFL-CIO, which represents Greyhound bus drivers in the Vancouver-Portland area, and the Amalgamated Council of Greyhound Divisions, AFL-CIO, which is comprised of numerous locals, including Division 1384, and represents all Greyhound drivers. Division 1384 and the Council are both labor organizations within the meaning of section 2(5) of the Act, 29 U.S.C. section 152(5), and are referred to collectively in this Brief as the "Union."

II. The Labor Dispute.

Since 1960, Greyhound bus drivers working on runs between Vancouver and Seattle, and between Seattle and Portland, had weekly work cycles, respectively, of six days on, three days off, and four days on, three days off. Unexpectedly, in April 1975, at a meeting

held to discuss other matters, Greyhound mentioned to the Union that it intended to change those work cycles to five days on, two days off.

Soon after the Union learned of this plan, it sent a letter to the Company contesting its right to change the work cycle unilaterally. It was the Union's position that the cycles in question had been in effect for fifteen (15) years pursuant to an agreement between the parties, and that the type of change being contemplated had never before been unilaterally made by Greyhound.

After the Union's initial letter of protest, additional correspondence passed between the parties and, on May 20, 1975, Greyhound posted new runs based on the proposed work cycles. The runs were scheduled to go into effect on June 25, 1975.

Two days after the runs were posted, the Union, both orally and in writing, requested that the dispute be arbitrated in an expedited manner. The Union believed that an expedited process was desirable because the grievance procedure normally requires: (1) the filing of a grievance and consideration of it at the local level; (2) a "presidential hearing"; (3) two-party arbitration; and (4) three-party arbitration. While it can easily take three (3) months just to reach the final step, the new work cycles were scheduled to go into effect in approximately one (1) month.

In return for its willingness to expedite the arbitration, the Union asked Greyhound to refrain from implementing the proposed work cycle changes until an

arbitrator ruled on their propriety. The reason for requesting maintenance of the status quo was that even an expedited arbitration would take some time and, if the changes were implemented before the arbitrator rendered his decision, the Company's drivers would suffer irreparable harm. This harm would result from the loss of jobs and earnings for some operators, and from an increase of nine (9) to ten (10) hours a week for other drivers, bringing their total workweek, in many cases, to fifty-five (55) hours and greatly increasing the stress and pressure under which they worked.

Despite the fact that the Company had been considering a change in the work cycle for a year or two, it refused to delay implementation of the change until an arbitrator could consider the dispute. The Company offered no reason why the proposed changes had to be implemented immediately and could not be postponed for a reasonable period while expedited arbitration took place. Instead, Greyhound's refusal to preserve the status quo was grounded simply on its assertion that "the company acts and [the Union] reacts." And adding insult to injury, Greyhound also refused to agree to expedited arbitration.

Faced with these refusals, and the irreparable harm its members would suffer if the work cycles were changed pending arbitration, the Union filed an action in the United States District Court for the Northern District of California, to preserve the status quo until an arbitrator could resolve the contractual dispute.

III. The Legal Proceedings Below.

On June 17, 1975, an evidentiary hearing was held before the District Court on the Union's application for a preliminary injunction. At the outset of the hearing, the Court rejected Greyhound's suggestion that it speculate as to which party was more likely to prevail on the merits of the dispute at arbitration. The Court found that "to determine which party is likely to succeed on the merits . . . would, in effect, decide the case on the merits" (Appendix A, p. 6) and, thereby, deprive the arbitrator of the role the parties had assigned to him. Accordingly, no evidence concerning the merits of the dispute was received by the Court at the hearing.

On June 19, 1975, the case was argued to the Court, and the following day an order was issued granting a preliminary injunction which prohibited Greyhound from "implementing the proposed change in the present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement." (Appendix A, p. 10.) The Court issued the injunction because it found that: (1) without going into the merits, it was evident that the Union's position was not frivolous (Appendix A, p. 6); (2) not enjoining Greyhound from implementing the scheduled changes pending arbitration would harm the Union much more than issuing the injunction would harm the Company (Appendix A, p. 9); and (3) the Union would suffer irreparable harm unless the injunction were issued. (Appendix A, p. 9.)

The injunction was conditioned on the Union's filing a bond in the sum of $10,000.00. As is customary, the bond was to cover the "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction." (Appendix A, p. 10.) Greyhound subsequently moved for an order to increase the amount of the bond; to have the bond cover attorney's fees; and to require that the bond be made payable not only on a finding that the Company was wrongfully enjoined, but also upon a ruling by the arbitrator in favor of Greyhound. These issues were briefed by the parties and argued to the Court on June 27, 1975. Three days later, the Court raised the amount of the bond to $15,000.00, but denied the Company's other requests.

Greyhound then appealed to the United States Court of Appeals for the Ninth Circuit, which unanimously affirmed the issuance of the injunction. The Ninth Circuit relied on this Court's decision in *Boys Markets, Inc. v. Retail Clerk's Union Local 770, supra,* which recognized that, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act, injunctive relief is available under 29 U.S.C. section 185 when: (1) a collective bargaining agreement contains a mandatory arbitration clause; (2) the underlying dispute is arbitrable; (3) the party seeking the injunction is ready and willing to arbitrate; and (4) injunctive relief is warranted under ordinary principles of equity.

There was no dispute that the first three conditions were met in the present case. As to the fourth condition, the Court of Appeals found that this Court's rulings in the *Steelworker's Trilogy,* 363 U.S. 564, 574, 593 (1960), and in *Boys Markets,* stressed the importance of arbitration in the labor field, and indicated that an effort to obtain a preliminary injunction in that context stands on a somewhat different footing than does an effort to secure such relief in the ordinary case. (Appendix B, p. 17.) To require a party to demonstrate that it is more likely to succeed on the merits, would involve an intrusion by the judiciary into the arbitration process. Accordingly, the Ninth Circuit agreed with Judge Friendly of the Second Circuit (*Hoh v. Pepsico, Inc.,* 491 F.2d 556 (1974)), that, in cases where an employer or union seeks injunctive relief in a labor arbitration context, the moving party is entitled to such relief if it establishes that "the position [it] will espouse in arbitration is sufficiently sound to prevent arbitration from being a futile endeavor." (Appendix B, p. 18.) The Court of Appeals found that a genuine dispute existed in the present case regarding an arbitrable issue and, accordingly, the issuance of a preliminary injunction was proper.

The Ninth Circuit also rejected Greyhound's contention that the injunction bond should have required payment if the Union lost on the merits before an arbitrator. Following the language of Rule 65(c) of the Federal Rules of Civil Procedure, section 7(e) of the Norris-LaGuardia Act, and the decision of the

Third Circuit in *United State Steel Corp. v. United Mine Workers of America,* 456 F.2d 483 (1972), the Court held that the bond was properly conditioned upon a subsequent finding that Greyhound had been wrongfully enjoined or restrained by the preliminary injunction. "To accept Geryhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Markets preliminary injunction.*" (Appendix B, p. 22.)[1]

On December 3-4, 1975, an arbitration was held of the underlying dispute between the parties. A decision was rendered by the arbitrator on April 7, 1976, and, by its own terms, the preliminary injunction terminated as of that date. Greyhound's Petition for a Writ of Certiorari was filed after the injunction had expired.

ARGUMENT

Basically, Greyhound advances two principal reasons why its Petition should be granted. First, the Company attempts to create the impression that the injunction issued by the District Court was an extraordinary intrusion by the federal judiciary into the process of labor arbitration and, even if this intrusion were proper, the lower courts need guidance in such

[1]The Court of Appeals also affirmed the District Court's finding of irreparable harm, but reversed on the issue of attorney's fees and held that the bond should cover such expenses. Neither the issue of irreparable harm, nor the issue of attorney's fees, is before this Court.

cases. In fact, however, no extraordinary intrusion occurred. Decisions by this Court, going back nearly twenty (20) years, clearly establish the power and propriety of judicial action when necessary to further the strong Congressional policy in favor of labor arbitration. The type of injunction involved in this case is common and has been issued by federal district courts for over a decade. In fact, this very Petitioner has been enjoined at least three times to preserve the status quo pending arbitration—the first such injunction having been issued thirteen years ago. See *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963); *Amalgamated Transit Union v. Greyhound Lines* (N.D. Calif., Docket No. C-72-2306, February 3, 1973).

Thus, the injunction issued in the present case was not an extraordinary new development in the labor law field, and the district courts have already received ample guidance from this Court regarding the grounds for issuing such equitable relief. That guidance was provided in *Boys Markets,* where, despite the provisions of the Norris-LaGuardia Act, this Court affirmed the power of the federal courts to issue injunctions when necessary to preserve the status quo pending arbitration.

The second major ground advanced by Petitioner in support of its Petition is that the decision of the Ninth Circuit conflicts with decisions of two other Circuits. In fact, however, there is no such conflict. Thus, no important question of law, or conflict between Circuits, exists which warrants the granting of the Petition.

Moreover, the Petition should be denied because the case is moot.

I. THIS CASE IS MOOT.

It is clearly established that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). This inability of the federal judiciary to review "moot" cases derives from the requirement of Article III of the Constitution, which conditions the exercise of judicial power on the existence of a "case or controversy." *Liner v. Jafco, Inc.,* 375 U.S. 301 (1964). Therefore, for this Court to render a decision, there must be an actual controversy at the stage of appellate or certiorari review, and not simply at the date the action was initiated. See, e.g., *SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972); *United States v. Munsingwear,* 340 U.S. 36 (1950).

In *DeFunis v. Odegaard,* 416 U.S. 312 (1974), this Court held that a challenge to the admissions policy of a law school was moot because the student bringing the action was about to graduate. The present case presents an even clearer case of mootness. While the Petition in *DeFunis* was filed at a time when an actual case or controversy still existed, that is not true in the current case. Greyhound's Petition was not filed until after the arbitration award had been rendered. (Petition, p. 9.) Since the injunction being challenged by the Company only remained in effect "pending a decision by arbitration," that injunction had ceased to exist, by its own terms, at the time the Petition was filed. Thus, no actual case or controversy existed between the parties when the Petition was filed and, accordingly, the Petition should be denied because the matter is moot. Cf., *Glen-Arden Commodities, Inc. v. Costantino,* 493 F.2d 1027, 1030 (2d Cir. 1974); *Benz v. Compania Naviera Hildalgo, S.A.,* 205 F.2d 944, 946 (9th Cir.), cert. denied, 346 U.S. 885 (1953); *Benitez v. Anciani,* 127 F.2d 121, 125 (1st Cir. 1942), cert. denied, 317 U.S. 699 (1943); *Southard & Co. v. Salinger,* 117 F.2d 194 (7th Cir. 1941).

II. THE ISSUANCE OF A PRELIMINARY INJUNCTION BY THE DISTRICT COURT WAS NECESSARY AND PROPER TO EFFECTUATE THE STRONG CONGRESSIONAL POLICY IN FAVOR OF LABOR ARBITRATION.

As previously noted, Petitioner attempts to create the impression that the injunction issued in this case was an unprecedented intrusion by the federal judiciary into the process of labor arbitration. In actuality, the injunction was neither unprecedented nor an intrution. It was not unprecedented because many other courts have issued injunctions in similar circumstances. It was not an intrusion because the District Court carefully avoided the merits of the arbitrable conflict and simply preserved the status quo until an arbitrator could resolve the dispute. But in order to fully understand why the preliminary injunction issued in this case was not an unprecedented judicial intrusion, an historic overview is necessary.

Prior to 1932, the federal courts had frequently abused their equitable powers by issuing *ex parte* restraining orders against labor union activities. See generally, F. Frankfurter & N. Greene, *The Labor Injunction* (1930); *Boys Markets v. Retail Clerks Union, supra,* 398 U.S. at 250. In response to this situation, Congress in 1932 passed the Norris-LaGuardia Act (29 U.S.C. sections 101-15) "to correct the abuses that had resulted from the interjection of the Federal judiciary into union-management disputes on behalf of management." *Boys Markets, supra,* 398 U.S. at 251. Norris-LaGuardia did not, however, create an absolute prohibition against federal injunctions. (See 29 U.S.C. sections 107-109.) Rather, section 4 (29 U.S.C. section 104) deprived the federal courts of jurisdiction to enjoin certain specified acts, including strikes, which involved, or grew out of, any labor dispute.

In *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.,* 353 U.S. 30 (1957), this Court made it clear, however, that even the seemingly absolute prohibition in Norris-LaGuardia against enjoining strikes did not prevent the federal courts from issuing injunctions against walkouts when such equitable relief was necessary to further the Congressional policy in favor of the system of arbitration established by the Railway Labor Act. And, in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.,* 363 U.S. 528 (1960), this Court held that such an injunction could be conditioned on the employer's restoring the status quo pending resolution of the dispute by arbitration. The Court decided that it was proper

to condition the injunction in that manner because the condition was designed to prevent "injury so irreparable that a decision by the Board in the union's favor would be but an empty victory." 363 U.S. at 534.

The *Locomotive Engineers'* decision left open the question of whether, during the pendency of a railroad dispute, a district court could order the employer to preserve the status quo independently of any suit for injunctive relief by the employer. 363 U.S. at 531 n. 3. That question was answered in the affirmative by the Second Circuit in *Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748 (2d Cir. 1964). The Court of Appeals ruled that the district court had the broad equitable power to issue injunctions to preserve the status quo if such relief were necessary to effectuate the purposes and policies of the Railway Labor Act. Nothing in the Norris-LaGuardia Act prevented such an injunction against an employer. 329 F.2d at 752-53. Accord, *Local Lodge 2144 v. Railway Express Agency, Inc.,* 409 F.2d 312 (2d Cir. 1969).[2]

The judicial policy of granting equitable relief when necessary to effectuate our national labor policy in favor of arbitration is not restricted to cases arising

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[2]More recently, in *Chicago and Northwestern Ry. Co. v. United Transportation Union,* 402 U.S. 570 (1971), this Court again affirmed that labor policies, which Congress has deemed important, may be enforced by injunction, despite the seemingly absolute prohibition of Norris-LaGuardia. In that case, the basis for seeking injunctive relief was not that a dispute was pending arbitration, but rather that the union had failed to make every reasonable effort to reach an agreement. 45 U.S.C. section 152 First. This Court held that the Norris-LaGuardia Act does not bar the issuance of an injunction against a union in those circumstances because injunctive relief is the only practical and effective means of enforcing an important policy of the Railway Labor Act. 402 U.S. at 583.

under the Railway Labor Act; rather, a similar and parallel practice has developed in cases brought pursuant to section 301 of the Labor-Management Relations Act. Beginning with the so-called *Steelworkers Trilogy, supra,* this Court has taken cognizance of, and emphasized, the importance that Congress, through the National Labor Relations Act, has attached to promoting "the peaceful settlement of labor disputes through arbitration." *Boys Markets, supra,* 398 U.S. at 241.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957), the Court considered the question of whether the Norris-LaGuardia Act withdrew from the federal courts to power to compel specific performance of the arbitration provisions contained in a collective bargaining agreement. The Court found that, while a literal reading of the Act might lead one to that conclusion, "the failure to arbitrate was not a part and parcel of the abuses against which the act was aimed." 353 U.S. at 458. Therefore, the Court ruled, an order compelling arbitration is not prohibited by section 4 of the Norris-LaGuardia Act.

The question of whether Norris-LaGuardia prohibits the federal courts from enjoining a strike in violation of a no-strike provision in a collective bargaining agreement was not finally resolved until thirteen years after the *Lincoln Mills* decision. This Court first ruled in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), that the courts had no jurisdiction to issue such injunctions. The *Sinclair* decision was overruled eight years later in *Boys Markets, supra.* The Court found that the *Sinclair* decision had not furthered, but rather

had frustrated, an important goal of the national labor policy—the peaceful settlement of disputes through arbitration. 398 U.S. at 241.

> "[T]he very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, *or other self-help measures.* This basic purpose is largely undercut if there is no immediate, effective remedy for these very tactics that arbitration is designed to obviate." 398 U.S. at 242. [Emphasis added.]

Thus, there is a body of law by this Court, going back nearly twenty (20) years, which clearly establishes the power and propriety of judicial intervention when necessary to further the strong Congressional policy in favor of arbitrating labor disputes. And the logical corollary to the *Boys Markets* decision is that federal courts may also issue injunctions against employers to preserve the status quo pending arbitration.[3] Pursuant to *Boys Markets,* strikes may be enjoined because, unless injunctions are available, there is no effective remedy for preventing the very work stoppages that the Congressional policy in favor of arbitration is designed to eliminate. Similarly, unless employers may be enjoined from engaging in "self-help" by implementing certain work changes prior to arbitration, the national policy in favor of peaceful resolution of disputes will also be threatened. Em-

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[3]Such injunctions—unlike those against strikes—are not prohibited by any language in section 4 of the Norris-LaGuardia Act. See *Lodge 2186, supra,* 329 F.2d at 753; *Bateman v. South Carolina State Ports Authority,* 298 F.Supp. 999 (D. S.C. 1969).

ployees will be less willing to surrender their right to strike during the term of a collective bargaining agreement if there are not restraints on the employer's ability to engage in self-help pending arbitration.

Stating that employers can be enjoined to preserve the status quo prior to arbitration is not to state, however, that unions can prevent an employer from taking action whenever it does something that is arguably arbitrable, and which the union does not like. As this Court made clear in *Boys Markets,* not every strike involving an arbitrable issue may be enjoined. 398 U.S. at 253-54. Rather, an injunction will issue only if it can be shown that the strike has caused, or will cause, irreparable harm, and that the employer will suffer more from the denial of the injunction than the union will suffer from its issuance. See *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 387 (1974). Similarly, an employer may be enjoined to preserve the status quo pending arbitration only if it can be shown that the changes it is attempting to implement have caused, or will cause, irreparable harm, and that the union or its members will suffer more from the denial of the injunction than the employer will suffer from its issuance.

Using these standards, District Courts throughout the country have issued injunctions against employers to preserve the status quo pending arbitration. See, e.g., *Letter Carriers, Branch 998 v. U.S. Postal Service,* 88 LRRM 3524 (M.D. Ga. 1975); *Letter Carriers, Branch 352 v. U.S. Postal Service,* 88 LRRM 2678 (S.D. La. 1975); *I.B.E.W. Local 1245 v. P. G. & E.*

(N.D. Calif., Docket No. C-74-2537, December 6, 1974); *Amalgamated Transit Union v. Greyhound Lines* (N.D. Calif., Docket No. C-72-2306, February 3, 1973); *Local 757 v. Budd Co.,* 345 F.Supp. 42 (E.D. Pa. 1972); *Local 294 v. Three Rivers Industries,* 78 LRRM 2090 (D. Mass. 1971); *I.U.E. v. Radio Corp. of America,* 77 LRRM 2201 (D. N.J. 1971); *United Steelworkers v. Blaw-Knox Foundry,* 319 F.Supp. 636 (W.D. Pa. 1970); *Teamsters Local 328 v. Armour,* 294 F.Supp. 168 (D. Mich. 1968); *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963).[4] As those courts have properly noted, an action to preserve the status quo pending arbitration is really an action, as in *Lincoln Mills,* to specifically enforce an arbitration clause. *Local 1098 v. Eastern Greyhound Lines, supra,* 225 F.Supp, at 31. As one court aptly stated:

> "The . . . Company has in essence put the 'cart before the horse.' The Company has followed a course of conduct which seems to indicate that they will [act] first and worry about arbitration and the collective bargaining agreement later. That is not the policy of our national labor laws. The policy as set forth in the Steelworkers Trilogy is to encourage the peaceful settlement of labor disputes through arbitration. If the court has the power to order specific performance of a contract covenant to arbitrate, it has the collateral power

[4]None of the district court cases cited above has been reviewed by a Court of Appeals. Two Circuits, however, in circumstances somewhat different than those in the present case, have recognized and exercised their power to grant injunctions on behalf of unions to preserve the status quo pending arbitration. See *Pressman's Union No. 9 v. Pittsburgh Press Co.,* 479 F.2d 607, 609 n. 1 (3d Cir. 1973); *Milk Drivers Local 338 v. Dairymen's League Co-op Assoc., Inc.,* 304 F.2d 913 (2d Cir. 1962).

to take steps that would prevent rendering the result of the arbitration futile and ineffective." *Local 757 v. Budd Co., supra,* 345 F.Supp. at 47.

Thus, Greyhound's attempt to portray the injunction in this case as an unprecedented judicial intrusion into the labor arbitration process is inaccurate. Nor is there any merit to the Company's claim that this case did not involve a "violation" of a labor contract which required judicial intervention in order to preserve the jurisdiction of the arbitrator and to allow the arbitration process to work.[5] The underlying dispute involved Greyhound's attempt to make certain unilateral changes, and the Union's contention that such action would *violate the collective bargaining agreement between the parties.* While that dispute was arbitrable under the agreement, had the proposed changes been implemented prior to arbitration, irreparable harm would have resulted.[6] Thus, even if the Union had

[5]Greyhound's argument that an injunction was improper in this case because it involved adding terms to the collective bargaining agreement (Petition, pp. 17-19), is really just another way of stating that there was no violation of the agreement. It should be noted that, in *Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962), this Court held that, where a collective bargaining agreement contains a broad arbitration clause, a no-strike provision will be *implied* if the agreement does not contain one. In a section 301 suit to enjoin a strike in violation of such an implied provision, it is, of course, no defense that the no-strike provision has been "added on" to the contract, or that there is no "violation" of the express terms of the written agreement.

[6]The Company's contention that the arbitrator could have provided an adequate remedy (Petition, pp. 15-16) is really an argument that no irreparable harm was present. But Greyhound has not raised that issue as one for consideration by the Court. (Petition, pp. 2-3.) And in any event, the lower court's finding of irreparable harm is presumptively correct (see, e.g., *Shearman v. Missouri Pac. R.R. Co.,* 250 F.2d 191 (8th Cir. 1957)), and can be

ultimately won the arbitration, it would have been damaged since, by its very nature, irreparable harm produces injury for which no arbitrator could subsequently provide adequate compensation.

By agreeing to arbitration, Greyhound also agreed to refrain from action which would render that process meaningless. Its proposed unilateral changes, however, would have produced damages for which there was no adequate remedy, and, therefore, injunctive relief to preserve the status quo pending arbitration was necessary to prevent "injury so irreparable that a decision by the [arbitrator] in the union's favor would be but an empty victory." *Brotherhood of Locomotive Engineers, supra,* 363 U.S. at 534. Injunctive relief in such circumstances is essential in order to make the arbitration process a meaningful one and, thereby, to effectuate "the basic policy of national labor legislation [which is] to promote the arbitral process as a substitute for economic warfare." *Teamsters v. Lucas Flour, supra,* 369 U.S. at 105.[7]

reversed only if there is clear proof that it is an abuse of discretion or is "clearly erroneous." *Id.; Washington Capitols Basketball Club v. Barry,* 419 F.2d 472 (9th Cir. 1969); *Local Lodge 2144, supra,* 409 F.2d at 317; *Tatum v. Blackstock,* 319 F.2d 397 (5th Cir. 1963); *Property Devel. Corp. v. Mitchell,* 286 F.2d 222 (7th Cir. 1961); Moore's *Federal Practice* (hereinafter "Moore"), ¶65.04[2], pp. 65-48 to 65-49 (2d ed. 1974).

[7]Greyhound's claim (Petition, pp. 18-19) that the Court of Appeals' decision in this case conflicts with the holding of the Sixth Circuit in *Detroit News. Pub. Ass'n v. Detroit Typo. Union,* 471 F.2d 872 (1972), *cert. denied,* 411 U.S. 967 (1973), is unfounded. In the latter case, section 10(b) of the contract provided that, if there were a dispute over the interpretation or application of the agreement, all working conditions prevailing prior to the change out of which the dispute arose would remain in effect pending resolution of the grievance. The employer contended that the change in question was not covered by section 10(b) and the

III. THE DISTRICT COURT PROPERLY REFUSED TO SPECULATE AS TO WHICH PARTY WAS MORE LIKELY TO PREVAIL ON THE MERITS AT ARBITRATION, SINCE SUCH SPECULATION WOULD HAVE CONSTITUTED AN IMPROPER JUDICIAL INTRUSION INTO THE DOMAIN OF THE ARBITRATOR.

After first attempting to portray the District Court's injunction as an extraordinary and improper judicial intrusion into the arbitration process, Greyhound then does a complete about-face and argues that the District Court should have considered the *merits* of the underlying disputes and speculated as to which party was more likely to succeed *at arbitration.*[8] Consideration of the merits, and speculation as to success, however, is precisely the type of judicial intrusion which should not take place, because it would thrust the court into the role that the parties reserved for the arbitrator.

At the evidentiary hearing, the District Court refused to accept any testimony relating to the Union's likelihood of success before the arbitrator because:

union sought an injunction to preserve the status quo pending arbitration. The District Court granted the relief on the ground that the employer violated section 10(b). The Sixth Circuit properly held that the District Court should not have construed section 10(b) and thereby judged the merits of the case. The order granting the injunction was reversed because the District Court failed to weigh the equities and because there was no showing of irreparable harm. 471 F.2d at 875. The Sixth Circuit did not hold, or imply, that a union could not obtain an injunction to preserve the status quo pending arbitration.

[8]There is no merit to Greyhound's contention that the preliminary injunction was not intended to enforce the arbitration provisions of the agreement, but rather to grant the Union relief that only the arbitrator could award.(Petition, p. 20.) The injunction merely preserved the status quo until the arbitrator could act. The *denial* of injunctive relief would have permitted the Company to make changes that only an arbitrator could rule were proper.

> "To determine which party is likely to succeed on the merits from the mass of conflicting evidence adduced by affidavits and oral testimony in this case would, in effect, decide the case on the merits. The interpretation of . . . the Agreement—on which the parties are in total disagreement—is properly the function and task of the arbitrator." (Appendix A, p. 6.)

Before the Ninth Circuit, Greyhound contended that *Boys Markets* required the Union to show a "reasonable likelihood of success" at arbitration in order for an injunction to issue preserving the status quo pending that proceeding. The Court of Appeals rejected that contention because:

> "The *Steelworkers' Trilogy* . . . and *Boys Markets,* by emphasizing the importance of arbitration to stable labor-management relations, indicate that an effort to obtain a preliminary injunction to compel arbitration stands on a somewhat different footing than does an effort to secure an injunction in the ordinary case." (Appendix B, p. 17.)

The Ninth Circuit's ruling is correct precisely because it recognizes the very important differences between a section 301 suit involving arbitration, and other actions seeking injunctive relief. As the Court of Appeals properly noted, an understanding of those differences begins with the *Steelworkers' Trilogy.* In all three of those cases, this Court reversed the lower courts on the same basic ground—that, in section 301 actions involving arbitration, the courts are not to become involved in the merits of the dispute. The

parties have not bargained for a judicial determination of their differences, but rather have agreed that disputes will be heard and settled by an arbitrator.

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. 'A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .' [Citation omitted.]
>
> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her [sic] personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *United Steelworks v. Warrior & Gulf Nav. Co., supra,* 363 U.S. at 581-82.

Because the parties have agreed to resolution of their disputes by an arbitrator, a court should not become involved in assessing the merits of their respective positions.

> "The question is not whether in the mind of the court there is equity in the claim." *United Steel Workers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960).
>
> "The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant." *Id.*
>
> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language which will support the claim." *Id.* at 568.

On the same day that the *Trilogy* was decided, this Court rendered its opinion in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., supra.* The Court of Appeals had reversed the conditioning of an anti-strike injunction on the employer's maintenance of the status quo because it believed that imposing such a condition constituted an actual or inherent decision on the merits. In reversing, this Court stated:

> "It is true that a District Court must make some examination of the nature of the dispute before conditioning relief since not all disputes . . . threaten irreparable injury . . . But this examination of the nature of the dispute is so unlike that which the [arbitration board] will make on the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [arbitration board]." 363 U.S. at 533-34.

This Court made it clear that, in determining whether to preserve the status quo, it is not the District Court's "function to construe the contractual provisions upon which the parties relied for their respective positions on the merits." *Id.* at 533; *Detroit News. Pub. Ass'n. v. Detroit Typo. Union,* 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973).

The ruling by the Court of Appeals in this case is consistent with this teaching and does not conflict with the Second Circuit's opinion in *Hoh v. Pepsico, supra.* The Ninth Circuit held that in injunction was properly issued against Greyhound because the Union had established that

> "the position [it] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (Appendix B, p. 18.)

This is the correct test because it takes cognizance of the special nature of section 301 suits involving arbitration. The test strikes a proper balance between allowing District Courts to deny injunctive relief in frivolous cases, and preventing the Courts from having to assess the relative likelihood of success—an assessment which would thrust the Courts into the merits of the case and the role of the arbitrator.[9]

No conflict exists between this test and the one laid down in *Hoh.* The Second Circuit merely held that:

> "[T]he 'ordinary principles of equity' referred to as a guide in that portion of *Sinclair* which was approved in *Boys Markets* include some likelihood of success . . . . It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was *plainly without merit.*" 419 F.2d at 561. [Emphasis added.]

Thus, *Hoh* does not support Greyhound's position that the District Court should have determined which party was more likely to succeed on the merits at arbitration. *Hoh* simply requires that there be "some likelihood of success" in the sense that the underlying claim, by the party seeking injunctive relief, is not "plainly without merit." Or, to state the same test in the words of the Ninth Circuit, the claim must be one which is "sufficiently sound to prevent the arbitration from being a futile gesture."[10]

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[9]This same balance was struck by this Court in the *Steelworkers Trilogy,* where it was held than an order compelling arbitration must be granted "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-83.

[10]There is no basis to Greyhound's contention that, if the decision of the Ninth Circuit stands, there will be no restraint on unions to seek injunctive relief whenever an employer takes some action the union does not like. Contrary to the Company's argument, injunctions will not be "easy to obtain because they can be obtained with impunity." (Petition, p. 10.) Under the Ninth Cir-

IV. THE DISTRICT COURT PROPERLY REFUSED TO CONDITION THE BOND UPON THE SUBSEQUENT RULING OF THE ARBITRATOR.

Upon issuing a preliminary injunction, the District Court required the Union to post a $15,000.00 bond, payment on which was conditioned—as is customary—on a subsequent showing that Greyhound had been "wrongfully enjoined or restrained." (Appendix A, p. 10.) The Company argued before the Ninth Circuit, however, that payment on the bond also should have been available if Greyhound subsequently won *before the arbitrator.*

The Ninth Circuit properly rejected this unique contention, noting that it was not supported by authority. (Appendix B, p. 21.)[11] In fact, the Company's position is directly contrary to Federal Rule of Civil Procedure 65(c), which provides, in relevant part, that:

> "No . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party *who is found to have been wrongfully restrained.*" [Emphasis added.][12]

There is no merit to Greyhound's contention that, because it ultimately prevailed in the arbitration, it was "wrongfully restrained" by the District Court. As Professor Moore has noted, an injunction bond

> "is not intended to cover payment of such sum as *the court may decree to be paid on the merits of the case,* but on the contrary, as we have said, to cover 'costs and damages' directly sustained as a result of an improvident issuance of the . . . preliminary injunction." *Moore,* supra, ¶65.09 at p. 65-94. [Emphasis added.] Accord, *Detroit Trust Co. v. Campbell River Timber Co.,* 98 F.2d 389, 393 (9th Cir. 1938).

If it is not proper for an injunction bond to be conditioned on *the court's* subsequent ruling on the merits of the case, *a fortiori,* it would be improper to condition it upon an *arbitrator's* subsequent ruling. As the Ninth Circuit properly recognized:

> "To accept Greyhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Markets* preliminary injunction." (Appendix B, p. 22.)

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cuit opinion, a union must still demonstrate that there is irreparable harm, and that it will be hurt more by the denial of an injunction than the employer will be hurt by its granting. Moreover, if the injunction is improperly granted, the union will be liable to the employer for any damages incurred. F.R.C.P. 65(c).

[11]Among the many cases in which employers have been enjoined to preserve the status quo pending arbitration, the Company is able to cite only two District Court cases in support of its position—*Steelworkers v. Blaw-Knox, supra,* and *Local 757 v. Budd Co., supra.* The former case, decided by a District Court in Pennsylvania, has been overruled by the subsequent decision of the Third Circuit in *United States Steel Corp. v. United Mine Workers,* which is discussed *infra.* The Company also refers to footnote 8 in the *Hoh* case (491 F.2d at 560-61), but the Second Circuit did not pass on the question of whether a bond should be conditioned on the arbitrator's ruling.

[12]It should be noted that section 7 of the Norris-LaGuardia Act also conditions payment on a bond on the "improvident or erroneous issuance" of an injunction. 29 U.S.C. section 107.

This holding by the Ninth Circuit is in accord with the ruling by the Third Circuit that payment on a bond in a section 301 action is proper only

> "if the preliminary injunction is found to have been improvidently granted or erroneously issued, that is, where the court did not hold a proper hearing or failed to make the factual determination mandated by Part V of the *Boys Markets* opinion or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the contract grievance-arbitration provision." *United States Steel Corp. v. United Mine Workers,* 456 F.2d 483, 488 (3d Cir.), cert. den. 408 U.S. 923 (1972). Accord, *Amalgamated Transit Union v. Greyhound Lines, supra; Local 17 v. Ringsby Truck Lines,* 77 LRRM 2928 (Colo. Dist. Ct. 1971).[13]

Finally, there is no merit to Greyhound's contention that the decision of the Ninth Circuit means that unions "run virtually no risk" of liability for damages if they are ultimately unsuccessful on the merits at arbitration. (Petition, p. 24.) An employer may, of course, request the arbitrator to grant damages for any losses it claims to have suffered as a result of not having been able to make certain changes. Greyhound, however, failed to make such request at arbitration and thereby waived its right to do so. It can-

[13]In any event, the conditioning of a bond, like the setting of its amount, is a matter that is left to the sound discretion of the District Court. See *Moore, supra,* ¶65.09 at pp. 65-94; *Detroit Trust Co. v. Campbell River Timber Co., supra,* 98 F.2d at 393; *Washington Capitols Basketball Club v. Barry,* 304 F.Supp. 1193, 1203 (N.D. Calif.), aff'd 419 F.2d 472 (9th Cir. 1969). Therefore, the District Court may only be reversed on this issue if there is a clear showing of abuse of discretion.

not now complain that it is unable to recover its damages—if, in fact, it suffered any—from the injunction bond, which was properly conditioned on a a showing that the Company had been wrongfully restrained.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that this Court deny the Petition.

Dated, June 23, 1976.

Respectfully submitted,

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